Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
	)	
Petition of Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and *Computer Inquiry* Rules with Respect to Broadband Services	)	WC Docket No. 04-440

OPPOSITION OF THE INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA

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SUMMARY

The "relief" that Verizon seeks goes well beyond the proposals that the Commission made – but has thus far declined to adopt – in the *ILEC Broadband Non-Dominance Notice* and the *Broadband Wireline ISP Notice.* If the Commission grants Verizon's petition, Verizon will have the legal right to *refuse* to provide broadband telecommunications services – including special access services – to non-affiliated ISPs. If Verizon chooses to provide these services to non-affiliated ISPs, it would be able to do so at prices, terms, and conditions that are significantly less favorable than those on which it provides the identical services to itself and its affiliates. To the extent non-affiliated ISPs remain in the market, Verizon would be able to distort competition by cross-subsidizing its broadband information service offerings.

THE COMMISSION SHOULD CONSOLIDATE VERIZON'S PETITION WITH THE NEARLY IDENTICAL PETITION FILED BY BELLSOUTH AND SHOULD DENY BOTH

Verizon's petition is yet another in a series of efforts by the BOCs to chip away at the Commission's pro-competitive regulatory regime. Indeed, Verizon acknowledges that it filed its forbearance petition in order to obtain precisely the same "relief" that BellSouth sought in the petition that it filed in October 2004. The issues raised by Verizon and BellSouth concern the most fundamental aspects of how the Commission should regulate broadband telecommunications services. The Commission should decline to consider these issues in a series of separate proceedings – which burden industry, while depriving the Commission of a comprehensive record. Instead, the Commission should deny the pending petitions, defer action until the Supreme Court issues a decision in the *Brand X* case, and then consider the underlying issues in the *ILEC Broadband Non-Dominance* and the *Broadband Wireline ISP* dockets.

BECAUSE THE ILECs RETAIN SIGNIFICANT MARKET POWER IN THE WHOLESALE BROADBAND TELECOMMUNICATIONS SERVICES MARKET, TITLE II REGULATION REMAINS NECESSARY

Verizon's assertion that the ILECs have "secondary status in *every* segment of the broadband market" is plainly wrong. Verizon and the other ILECs retain a dominant position in the provision of *wholesale* broadband telecommunication services, which ISPs require in order to provide service to both mass market and enterprise customers.

Wholesale Mass Market. There is little "intermodal" competition in the wholesale mass market broadband telecommunications service market. No cable system offers a generally available wholesale broadband transmission service that ISPs can use to serve their mass market retail customers. Whatever their future potential may be, wireless and satellite providers currently are niche players in the broadband market. Indeed, the Commission itself has found that their combined market share is less than one percent. Contrary to Verizon's assertion, the Commission can neither ignore the current absence of wholesale competition, nor grant forbearance based on Verizon's unsupported assertions as to what the level of wholesale competition might be in the future.

Special Access. Verizon's forbearance request apparently applies to broadband special access services, which ISPs often use to provide service to their enterprise customers. The Commission recently recognized that, in the years after it granted the ILECs pricing flexibility, their rate of return soared to more than 40 percent. Given the absence of effective competition, the Commission should eliminate the ILECs' "pricing flexibility" in the special access market. Even if the Commission declines to do so, however, it plainly should not eliminate the ILECs' obligation, under Title II, to make special access services available on just, reasonable, and non-discriminatory prices, terms, and conditions.

THE COMMISSION CANNOT – AND SHOULD NOT – ELIMINATE VERIZON'S OBLIGATION TO COMPLY WITH THE *COMPUTER II* UNBUNDLING RULES

The Commission lacks legal authority to eliminate Verizon's obligation to unbundle the telecommunications services that it uses to provide information services. The Commission has repeatedly held that Section 202(a) of the Communications Act – which prohibits common carriers from engaging in "unjust or unreasonable discrimination" in the provision of a telecommunications service – imposes an independent obligation on facilities-based carriers to unbundle the transmission capacity underlying its information services and make those services available to non-affiliated ISPs. The Commission cannot eliminate a carrier's statutory non-discrimination obligation through the use of its forbearance power.

The fact that the Commission has chosen not to extend the unbundling requirement to cable operators does not provide a basis for removing that requirement from telecommunications carriers. Contrary to Verizon's assertion, Section 706 of the Telecommunications Act does not require that ILEC and cable-provided broadband must regulated identically. Indeed, the *only* reference to "platform neutrality" in Section 706 is in the definitional portion, which states that "advanced telecommunications capability" is *defined* as high-speed broadband telecommunications "without regard to any transmission media or technology." While this provision demonstrates Congress's awareness that numerous technologies can be used to provide broadband telecommunications, nothing in the language of the statute – or in the legislative history – suggests that Congress intended to override the distinction contained elsewhere in the Communications Act between ILECs and other providers, or to divest the Commission of its authority to apply different regulatory approaches to different providers.

THE COMMISSION SHOULD NOT FORBEAR FROM APPLYING THE JOINT COST RULES TO VERIZON'S BROADBAND SERVICES

The Commission should not forbear from applying the Joint Cost Rules to ILEC network facilities used to provide broadband information services. If the Commission were to do so, Verizon could force its basic telecommunications customers to absorb 100 percent of the cost of any facility that is used to provide both basic telecommunications and broadband information services. This plainly would harm consumers, while distorting competition in the information services market.

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OPPOSITION OF THE INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA

The Information Technology Association of America ("ITAA") hereby opposes the Petition filed by the Verizon Telephone Companies. ("Verizon") for forbearance from the application of Title II common carrier requirements, the *Computer II* unbundling requirements, and the Commission's Joint Cost Rules to Verizon's broadband telecommunications services.[1]

INTRODUCTION

Verizon contends that, pursuant to Section 10 of the Communications Act,[2] and Section 706 of the Telecommunication Act,[3] the Commission must eliminate three categories of regulation. First, Verizon insists that the Commission must eliminate application of all "Title II common carrier requirements" to Verizon's broadband telecommunications service.[4] Second,

[1] *See Petition of Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, WC Docket No. 04-440 (filed Dec. 20, 2004) ("*Verizon Petition*").

[2] *See* 47 U.S.C. § 160.

[3] See *id.* § 157 (note).

[4] *Verizon Petition* at 14-20.

Verizon demands that the Commission lift the requirement, contained in the Commission's *Computer II* rules, that Verizon unbundle the broadband transmission functionality that it uses to provide information services, and offer that functionality to non-affiliated information service providers ("ISPs") as a tariffed telecommunications service.[5] Finally, Verizon asks the Commission to eliminate its obligation to comply with the Joint Cost Rules, which require incumbent local exchange carriers ("ILECs") to reasonably allocate costs between their regulated and non-regulated offerings.[6]

By its own admission, Verizon seeks unprecedented relief: it asks the Commission to allow it to offer telecommunications services "on a private carriage basis."[7] If the Commission grants Verizon's petition, Verizon will have the legal right to *refuse* to provide broadband telecommunications services – including most special access services – to non-affiliated ISPs. If Verizon chooses to provide these services to non-affiliated ISPs, it will be able to do so at prices, terms, and conditions that are significantly less favorable than those on which it provides the identical services to its own information service operations. Because ISPs generally are not able to purchase wholesale broadband transmission service from cable, wireless, or satellite providers, a decision by Verizon not to provide broadband telecommunications to an ISP – or to provide it on unreasonable and discriminatory prices, terms, and conditions – would make it literally *impossible* for many ISPs in the Verizon service region to provide competitive broadband

[5] *Id. at* 20-23. Verizon, however, fundamentally mistakes the Commission's requirement. Contrary to Verizon's assertion, *id.* at 21, the *Computer II* unbundling requirement does not require Verizon to allow ISPs to purchase transmission services "on *cost-based* terms and conditions." (emphasis added) Rather, Verizon is obligated to allow ISPs to purchase transmission services on *just, reasonable, and non-discriminatory* terms and conditions. Such prices permit Verizon to recover its historic costs.

[6] *Id.* at 21 n.51.

[7] *Id.* at 20.

information services. To the extent that ISPs remained in the market, Verizon – freed from the Commission's Joint Cost Rules – would be able to distort competition by cross-subsidizing its broadband information service offerings.

The "relief" that Verizon seeks goes well beyond the proposals that the Commission made – but has thus far declined to adopt – in the *ILEC Broadband Non-Dominance Notice*.[8] In that docket, the Commission proposed to continue to require the ILECs to provide broadband telecommunications services on a common carrier basis, while eliminating dominant carrier regulations (such as the duty to file tariffs) applicable to many of these services.[9] Here, by contrast, Verizon seeks complete elimination of Title II common carrier regulation. This includes the obligation, contained in Section 202(b) of the Act, that the ILECs provide telecommunications service on just, reasonable, and non-discriminatory prices, terms, and conditions.[10] Moreover, Verizon's petition apparently seeks deregulation of broadband special access services, which the Commission specifically excluded from consideration in the *ILEC Broadband Non-Dominance* proceeding.[11]

Similarly, Verizon's forbearance petition seeks more extensive deregulation than the Commission proposed – but has thus far declined to grant – in the *Broadband Wireline ISP*

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[8] *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services,* Notice of Proposed Rulemaking, 16 FCC Rcd 22745 (2001) ("*ILEC Broadband Non-Dominance Notice*").

[9] *See id.* at 22763-69.

[10] *See* 47 U.S.C. § 202(b).

[11] *See ILEC Broadband Non-Dominance Notice*, 16 FCC Rcd at 22758 (noting that the proceeding did not address regulatory treatment of "traditional special access services . . . [which] are governed by the Commission's pricing flexibility regime").

Notice.[12] In that docket, the Commission proposed to eliminate application of the *Computer II* unbundling requirement to mass market telecommunications services, such as digital subscriber line ("DSL") services, that the ILECs use to provide broadband Internet access service.[13] Here, by contrast, Verizon demands that the Commission forbear from applying the *Computer II* unbundling requirement to any broadband telecommunications service that an ILEC uses to provide any information service. Moreover, Verizon's petition seeks elimination of the Joint Cost Rules, which the Commission has never proposed.[14]

For the reasons set forth below, the Commission should deny in full Verizon's forbearance petition.

STATEMENT OF INTEREST

ITAA is the principal trade association of the computer software and services industry. ITAA has 500 member companies located throughout the United States – ranging from major multinational corporations to small, locally based enterprises. ITAA's members include a significant number of ISPs that have always been (and remain) critically dependent on telecommunications services provided by the ILECs. Therefore, during the last 25 years, ITAA (and its predecessor, ADAPSO) has participated actively in Commission proceedings governing the obligations of the Bell Operating Companies ("BOCs") and other ILECs to offer the basic telecommunications services that are necessary to provide information services on a just, reasonable,

[12] *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities,* Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002) ("*Broadband Wireline ISP Notice*").

[13] *See id.* at 3040-43 (seeking comments regarding application of the Computer Rules "to self-provisioned wireline broadband Internet access service.").

[14] In the *Broadband Wireline ISP* docket, the Commission sought comment regarding the elimination of the "access safeguards" that the Commission adopted in the *Computer Inquiries* – specifically the unbundling, comparably efficient interconnection, and open network architecture requirements. *See id.* The Commission did not propose to eliminate safeguards, such as the Joint Cost Rules, designed to prevent cross-subsidization.

and non-discriminatory basis. Such participation has included all three of the *Computer Inquiries,* as well as the *Open Network Architecture*, *Competitive Carrier*, *Local Competition*, *Access Reform*, *Broadband Non-Dominance*, and *Broadband Wireline ISP* proceedings. ITAA also opposed the recent forbearance petitions filed by BellSouth and Qwest, which raise similar issues.

I. THE COMMISSION SHOULD CONSOLIDATE VERIZON'S PETITION WITH THE NEARLY IDENTICAL PETITION FILED BY BELLSOUTH, AND SHOULD DENY BOTH

Verizon's petition is yet another in a series of efforts by the BOCs to chip away at the Commission's pro-competitive regulatory regime. Indeed, Verizon acknowledges that it filed its forbearance petition in order to obtain precisely the same "relief" that BellSouth sought in the petition that it filed in October 2004.[15] The Commission should consolidate the two petitions, and then deny both.

Resolving these issues on a piecemeal basis, in carrier-specific proceedings, will not serve the public interest.[16] The issues raised by Verizon and BellSouth concern the most fundamental aspects of how the Commission should regulate broadband telecommunications services. In particular, both petitions ask the Commission to take the radical step of eliminating the ILECs' long-established duty, as common carriers, to provide telecommunications service on just, reasonable, and non-discriminatory terms. Addressing these issues in a series of ILEC-initiated proceedings imposes needless costs on the Commission and the industry, while denying

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[15] *See Verizon Petition* at 1; *see also Petition of BellSouth Telecommunications, Inc. For Forbearance Under 47 U.S.C. § 160(c) From Application of Computer Inquiry and Title II Common-Carriage Requirements*, WC Docket No. 04-405 (filed Oct. 27, 2004). Qwest sought similar, although significantly more limited, forbearance in its recent petition. *See Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) Pertaining to Qwest's xDSL Services*, WC Docket No. 04-416 (filed Nov. 10, 2004).

[16] *See* 47 U.S.C. § 160(a)(3) (Commission must determine that granting the forbearance petition is "consistent with the public interest").

the Commission a comprehensive record. Rather than doing so, the Commission should deny the pending petitions and consider the underlying issues in a comprehensive proceeding. This will result in the adoption of a decision that applies to all similarly situated carriers.

Denial of these petitions is especially appropriate given the fact that the Commission has previously sought comment regarding the appropriate regulatory regime for broadband services in the *ILEC Broadband Non-Dominance* and the *Broadband Wireline ISP* dockets. The Commission has previously decided to defer action in these dockets, pending a determination by the Supreme Court in the *Brand X* case regarding the Commission's decision not to extend the Title II and *Computer II* requirements to cable-provided broadband services.[17] The Court has scheduled oral argument for March 29, 2005, and could well issue an opinion by the end of its current Term. Once the Court has provided the needed guidance, the Commission can address these issues in its open rulemaking dockets.

II. BECAUSE VERIZON RETAINS SIGNIFICANT MARKET POWER IN THE WHOLESALE BROADBAND TELECOMMUNICATIONS SERVICES MARKET, TITLE II COMMON CARRIER REGULATION REMAINS NECESSARY

Verizon asserts that Title II common carrier regulation of ILEC-provided broadband services is no longer necessary because the ILECs have "secondary status in *every* segment of the broadband market," which Verizon insists is subject to "intense intermodal competition."[18] Verizon's assertion is wrong. Verizon and the other ILECs plainly retain a dominant position in the provision of *wholesale* broadband telecommunication services, which ISPs require in order to provide service to both mass market and enterprise customers. Contrary to Verizon's assertion,

[17] *See National Cable & Telecommunications Association v. Brand X Internet Services,* 345 F.3d 1120 (9th Cir. 2003), *cert. granted*, 125 S. Ct. 655 (U.S. Dec. 3, 2004) (Nos. 04-277 & 04-281).

[18] *Verizon Petition* at 2-3 (emphasis in original); *see also id.* at 4 ("ILECs . . . are . . . distant second-place competitors in each segment of the broadband market.").

the Commission can neither ignore the current absence of wholesale competition, nor grant forbearance based on Verizon's unsupported assertions as to what the level of wholesale competition might be in the future. The Commission, therefore, should not eliminate Verizon's obligation to provide broadband telecommunications services to ISPs on just, reasonable, and non-discriminatory prices, terms, and conditions.

A. The ILECs Are Not Subject to Competition in the Market for *Wholesale* Mass Market Broadband Telecommunications Services

1. There currently is little, if any, intermodal competition in the wholesale market

Verizon contends that the market for "broadband services" is a competitive one, in which the ILECs are subject to "intermodal" competition from cable, wireless, and satellite providers.[19] Verizon, however, focuses only on the provision of *retail* mass market broadband information services – such as the provision of broadband Internet access to residential consumers. There is no doubt that, at the present time, far more residential customers obtain broadband Internet access service from cable-based ISPs than from wireline-based ISPs. Verizon, however, has almost completely ignored the *wholesale* market. ISPs that do not own their own facilities, but which seek to provide broadband information services to mass market customers, must obtain broadband transmission service. In most cases, ISPs have no viable alternative but to obtain this wholesale service from an ILEC.

[19] *See id.* at 6. Verizon does not even attempt to argue that broadband telecommunications service provided by competitive local exchange carriers ("CLECs") offers a viable competitive alternative to the ILECs' wholesale broadband transmission service. This is understandable. Given the Commission's decision to eliminate the ILECs' obligation to unbundle many elements of their broadband networks, and allow CLECs to lease them at cost-based prices, CLECs will have an increasingly difficult time surviving in this market.

Cable systems do not provide intermodal competition in the wholesale mass market broadband telecommunications service market.[20] To the contrary, no cable system offers a generally available wholesale broadband transmission service that ISPs can use to serve their mass market retail customers.[21] Indeed, the Commission has repeatedly rejected proposals to require cable operators to do so.[22] Moreover, efforts by some localities to impose "open access" requirements have been found to be unlawful.[23] As a result, in most cases, an ISP that is unable to obtain wholesale broadband telecommunications services from an ILEC at a reasonable price cannot obtain a substitute service from a cable system operator.

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[20] ITAA discussed the lack of intermodal and intramodal competition in the market for wholesale mass market broadband telecommunications services in greater detail in the comments that it filed in the *ILEC Broadband Non-Dominance* proceeding. *See* Comments of the Information Technology Association of America, CC Docket No. 01-337 (filed Mar. 1, 2002). ITAA respectfully requests that those comments be incorporated in the record of this proceeding.

[21] In any case, because cable systems typically serve only residential customers, ISPs generally cannot use cable to access business customers. Rather, in most cases, the only feasible means to provide broadband information services to these customers is over the public switched telephone network.

[22] *See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities,* Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002). At the present time, only one cable system (Time Warner) is under any legal obligation to cooperate with non-affiliated ISPs. Even Time Warner, however, is not subject to a general requirement to provide a wholesale broadband transmission service available to any ISP. Rather, pursuant to a consent decree with the Federal Trade Commission, and consistent with the Commission's order approving the necessary transfers of control in the AOL-Time Warner merger, prior to offering the AOL service to Time Warner cable subscribers, AOL Time Warner was required to enter into agreements with three nonaffiliated ISPs in which AOL Time Warner and the ISP jointly provide a high-speed Internet access service to retail customers. *See Application for Consent of Transfer of Control of Licenses and Section 214 Authorization by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner, Inc., Transferee,* Memorandum Opinion and Order, 16 FCC Rcd 6457, 6568-69 (2000).

[23] *See, e.g., AT&T v. City of Portland*, 216 F.3d 871 (9th Cir. 2000) (Communications Act precludes franchise authority from conditioning a cable license transfer on provision of "open access").

ISPs also generally cannot obtain wholesale broadband telecommunications service from other platform providers. Whatever their future potential may be, at present, wireless and satellite providers remain niche players in the broadband market. Indeed, the Commission has recognized that, at present, wireless and satellite providers have a collective market share of less than one percent.[24] And while the Commission has taken important action to facilitate the deployment of broadband over power line ("BPL") services, Verizon has offered no evidence that any customer – wholesale or retail – currently is obtaining a commercial broadband service from a BPL provider.

2. Verizon cannot justify its forbearance request based on its unsupported assertions about future market conditions

Unable to dispute that wireless, satellite, and BPL currently do not provide effective competition to ILEC-provided broadband telecommunications services, Verizon makes the remarkable claim that – under existing Commission precedent – the Commission should ignore current market conditions and, instead, must "take account of 'future market conditions'" in determining whether to grant a forbearance request.[25] This is plainly wrong.

The *Bell Atlantic/NYNEX Merger Order,* on which Verizon relies, did not involve a forbearance petition. Rather, it concerned an application for transfer of control of licenses in connection with a proposed merger. As the Commission recognized, under the Communications Act, the agency can only approve a transfer of control in connection with a merger if it is

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[24] *Availability of Advanced Telecommunications Capacity in the United States*, Fourth Report to Congress, 19 FCC Rcd 20540, 20555 (2004).

[25] *Verizon Petition* at 7 n. 20 (quoting *Application of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent To Transfer Control of NYNEX Corp. and Its Subsidiaries,* 12 FCC Rcd 19985, 19989-90 & 20011-12 (1997) ("*Bell Atlantic/NYNEX Merger Order*")).

"convinced that it will enhance competition."[26] In order words, the Commission can only grant a transfer of control application if it determines that – after the merger – the market will be more competitive. Doing so, by necessity, requires the Commission to make a predictive judgment about the future level of competition in the market.

The Commission must undertake a significantly different analysis when it considers a petition to forbear from continuing to apply a statutory provision or regulation. Specifically, the Commission must determine whether continued enforcement of the provision or regulation is neither "necessary to ensure" that a carrier's "charges, practices, classifications, or regulations . . . are just and reasonable and are not unjustly or unreasonably discriminatory" nor "necessary for the protection of consumers."[27] To make this assessment, the Commission must consider *current* market conditions. Even if the Commission anticipates that – at some point in the future – a particular market will be competitive, it cannot conclude that regulation currently is unnecessary if the market is not yet sufficiently competitive.

In any case, Verizon provides no evidence that the wholesale broadband market will be competitive in the future. Even if satellite, wireless, and BPL services grow significantly in the coming years, these providers – like cable operators – are not under a legal obligation to "open" their transmission networks to non-affiliated ISPs. As a result, like cable operators, they may decline to provide wholesale transmission service to non-affiliated ISPs that seek to serve mass market customers – and, instead, offer retail mass market customers a bundled service consisting of transmission and information services.

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[26] *Bell Atlantic/NYNEX Merger Order,* 12 FCC Rcd at 19987.

[27] 47 U.S.C. §§ 160(a) & (b).

3. Verizon's claim that the Commission should ignore the lack of wholesale competition is meritless

Because Verizon cannot prove *either* that the broadband telecommunication market is currently competitive, *or* that the market is likely to be competitive in the future, Verizon is reduced to making the extraordinary claim that the Commission should simply ignore the complete absence of competition at the wholesale level – and, instead, focus exclusively on competition at the retail level.[28] In support of this contention, Verizon relies on the Commission's decision in the *Section 271 Forbearance Order*, in which the Commission forbeared from requiring the BOCs to unbundle those broadband network elements that the agency had previously held did not have to be unbundled pursuant to Section 251.[29]

Verizon's reliance on the *Section 271 Forbearance Order* is misplaced. In that order, the Commission observed that, in determining whether regulation remains necessary to ensure that a carrier's charges are just, reasonable, and not unreasonably discriminatory, it generally "placed emphasis on the wholesale aspect" of the market.[30] However, given the "particular

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[28] *See Verizon Petition* at 16 (The Commission has found that "competition within the retail market [is] the proper focus for determining whether forbearance [is] appropriate.").

[29] *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, Memorandum Opinion and Order, 19 FCC Rcd 21496 (2004) ("*Section 271 Forbearance Order*").

[30] *Id.* at 21505 & n.62. The Commission cited its earlier decision in *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Memorandum Opinion and Order, 17 FCC Rcd 27000 (2002) as an example of a case in which it gave full consideration to competition in the wholesale market. In that Order, the Commission found that the market for wholesale telecommunications service provided by the SBC operating companies to retail advanced service providers was not subject to effective competition. However, the Commission determined that it was possible to forbear from applying tariff regulation to SBC's retail advanced service because continued regulation of SBC's wholesale services – coupled with the imposition of structural separation between the SBC operating companies and SBC's advanced service affiliate – was sufficient to prevent SBC from engaging in anti-competitive conduct in the retail market. *See id.* at 27009-27013. In the present proceeding, by contrast, Verizon does not claim that continued regulation of its wholesale services obviates the need for

circumstances" in that proceeding, the Commission determined that it was "appropriate to consider the wholesale market in conjunction with . . . the downstream retail broadband market."[31] Applying this approach, the Commission made a "prediction" that increased competition at the retail level "will pressure the BOCs to utilize wholesale customers to grow their share of the broadband markets" and, therefore, that regulation was not necessary because market forces would ensure that "the BOCs will offer [wholesale] customers reasonable rates and terms in order to retain their business."[32]

Subsequent events have demonstrated that the Commission's predictive judgment was incorrect. The Commission now has indisputable evidence that the ILECs will discriminate in the provision of wholesale telecommunications services to firms that compete against them in "downstream" markets. Less than two months after it released the *Section 271 Forbearance Order*, the Commission concluded that another ILEC, BellSouth, had engaged in unlawful discrimination in the provision of special access service – an essential wholesale service used by competing long distance carriers to provide service to their enterprise customers. Specifically, the Commission found that BellSouth had offered greater discounts to its long distance affiliate than to non-affiliated long distance competitors.[33] If the ILECs are willing to discriminate against wholesale telecommunications service customers that compete against them in the

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continued regulation of its retail service. Rather, Verizon contends that, because its retail services are competitive, the Commission should deregulate its wholesale services even though they are not subject to competition.

[31] *Section 271 Forbearance Order*, 19 FCC Rcd at 21505.

[32] *Id.* at 21508. While the Commission concluded that it was not necessary to find that the wholesale market is "fully competitive" before granting forbearance, *id.* at 21509, the Commission plainly did not find that it could grant forbearance in the absence of any evidence of wholesale competition.

[33] *See AT&T Corp. v. BellSouth Telecommunications, Inc.,* Memorandum Opinion and Order, 19 FCC Rcd 23898 (2004).

"downstream" long distance market, there is every reason to believe that the ILECs are also willing to discriminate against wholesale telecommunications service customers that compete against them in the "downstream" information services market. The Commission, therefore, cannot assume that competition in the retail broadband information services market will constrain Verizon from acting anti-competitively in the wholesale broadband telecommunications market.

Finally, Verizon's reliance on the Commission's decision to forbear from imposing certain regulatory requirements on the BOCs' international directory services is completely misplaced.[34] The Commission found that it was appropriate to grant those forbearance requests for two reasons. First, the Commission noted that the BOCs were new entrants into the international directory services market. Second, the Commission found that – even where the BOCs have ownership interests in foreign carriers that are dominant in their home market – the BOCs did not have the ability to impede rival U.S. carriers' access to information, controlled by those foreign carriers, that is necessary to provide a competing international directory service.[35]

In the present case, by contrast, Verizon is not a new entrant; it is the incumbent monopoly provider of wholesale telecommunications services that ISPs use to provide service to their customers. Verizon, moreover, has complete control over these essential inputs, and has the incentive to use that control to impede the ability of non-affiliated ISPs to compete. If anything,

[34] *See Verizon Petition* at 18. Unlike the present case, those decisions did not involve a request to forbear from the application of the core Title II non-discrimination requirements to telecommunications services. Rather, they concerned narrow requests to forbear from imposing the Section 272 structural separation requirements applicable to the BOCs' provision of information services.

[35] *See Petition of SBC Communications Inc. for Forbearance from Structural Separation Requirements of Section 272 of the Communications Act of 1934, as Amended, and Request for Relief to Provide International Directory Assistance*, Memorandum Opinion and Order, 19 FCC Rcd 5211, 5223 (2004).

the present case is far more like the *U S WEST NDA Forbearance* proceeding, in which the Commission declined to forbear from requiring U S WEST to comply with statutory non-discrimination requirements applicable to its provision of in-region directory assistance service because of evidence that U S WEST had used its control over a critical wholesale input – its directory assistance database – to impede competition in the retail local directory assistance market.[36]

Because ILECs are not subject to competition in the market for wholesale mass market telecommunications services, the Commission should not reduce or eliminate Title II common carrier regulation of these offerings.

B. ISPs That Serve Enterprise Customers Remain Dependent on the ILECs for Special Access Services

Verizon's petition is not limited to mass market broadband services. Rather, Verizon asserts that the Commission must forbear from applying Title II regulation "to any broadband services offered by Verizon."[37] Thus, Verizon's forbearance request apparently applies to most special access services, which ISPs often use to provide service to their enterprise customers.

The Commission has always recognized that the ILECs must offer special access services on a common carrier basis. In 1999, however, the Commission granted the ILECs significant "pricing flexibility" based on its expectation that significant competition would develop in this market.[38] In the years since the Commission did so, the ILECs have significantly increased their special access prices, and now earn a return well in excess of competitive levels.

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[36] *See Petition of U S WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, Memorandum Opinion and Order, 14 FCC Rcd 16252 (1999).

[37] *Verizon Petition* at 1.

[38] *See Access Charge Reform,* Fifth Report and Order, 14 FCC Rcd 14221 (1999).

Indeed, just last month, the Commission found that, between 2001 and 2003, the BOCs' overall special access rate of return ranged between 38 and 44 percent – a substantial increase over the rates of return that the BOCs earned prior to the adoption of the pricing flexibility regime.[39] The Commission has now sought comments as to whether it should modify its pricing flexibility rules.

ITAA believes that, given the absence of effective competition, the Commission should eliminate the ILECs' "pricing flexibility" in the special access market. Even if the Commission declines to do so, however, it plainly should not eliminate the ILECs' obligation, under Title II, to make special access services available to ISPs and other customers on just, reasonable, and non-discriminatory prices, terms, and conditions.

III. THE COMMISSION CANNOT – AND SHOULD NOT – ELIMINATE VERIZON'S OBLIGATION TO UNBUNDLE, AND OFFER ON A NON-DISCRIMINATORY BASIS, THE BROADBAND TELECOMMUICATIONS SERVICE THAT IT USES TO PROVIDE INFORMATION SERVICES

Verizon demands that the Commission forbear from applying the requirement, contained in the *Computer II* rules, that the ILECs unbundle the broadband transmission functionality that they use to provide information services, offer that functionality as a tariffed telecommunications service, and obtain that service on the same tariffed prices, terms, and conditions as non-affiliated ISPs. In support of this request, Verizon notes that the Commission has not imposed a comparable requirement on cable systems. Verizon adds that, pursuant to Section 706 of the Telecommunications Act, the Commission must regulate ILEC and cable-provided broadband services in the same manner. Verizon's contention is not correct.

[39] *See Special Access Rates for Price Cap Local Exchange Carriers,* Order and Notice of Proposed Rulemaking, WC Docket No. 05-25, FCC 05-18, ¶¶ 27-28 (rel. Jan. 31, 2005).

A. The Commission Lacks the Legal Authority to Eliminate Verizon's Obligation to Provide Telecommunications Service to Non-Affiliated ISPs on a Non-Discriminatory Basis

As an initial matter, the Commission cannot eliminate the requirement that Verizon unbundle the telecommunications services that it uses to provide information services, and make those services available to non-affiliated ISPs, because doing so would violate the Communications Act. Section 202(a) of the Act prohibits carriers – whether dominant or non-dominant – from engaging in "unjust or unreasonable discrimination" in the provision of a telecommunications service.[40] The Commission has held repeatedly that this provision imposes an independent obligation – separate from the one contained in the *Computer II* rules – that requires any facilities-based carrier that provides information services to unbundle the transmission capacity underlying its information services and make that capacity available to competing ISPs on a non-discriminatory basis. [41]

Consistent with this principle, in the *Interexchange Marketplace Reconsideration Order,* adopted in 1995, the Commission observed that – in addition to the *Computer II* unbundling requirement – "section 202 of the Act prohibits [facilities-based carriers] from discriminating unreasonably in [the] provision of basic services" to non-affiliated ISPs.[42] Similarly, in the *Frame Relay Order,* which held that the *Computer II* rules required AT&T to unbundle its basic frame relay service, the Commission noted that "Section 202 of the Act *also* prohibits a carrier

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[40] 47 U.S.C. § 202(a).

[41] Verizon's suggestion that this obligation does not apply to long distance carriers is flatly wrong. *See Verizon Petition* at 11 (While "long distance carriers are nominally subject to Title II, the Commission now largely permits these carriers to operate free of regulation."). Rather, the Commission has applied this "layer-based" approach to all carriers that control infrastructure.

[42] *Competition in the Interstate Interexchange Marketplace,* Memorandum Opinion and Order On Reconsideration, 10 FCC Rcd 4562, 4580 & n.72 (1995).

from discriminating unreasonably in its provision of basic services."[43] And, more recently, in the *CPE/Enhanced Service Bundling Order,* the Commission re-iterated that "all carriers have a firm obligation under section 202 of the Act to not discriminate in their provision of transmission service to competitive internet or other enhanced [information] service providers."[44] The Commission further observed that "discrimination . . . that favor[s] one competitive enhanced service provider over another or the carrier, itself, [is also] an unreasonable practice under section 201(b) of the Act."[45]

The Commission cannot eliminate the statutory non-discrimination obligation through the use of its forbearance power. Section 10 of the Communications Act, which is the Commission's sole source of forbearance authority,[46] does not allow the Commission to forebear from imposing any statutory provision necessary to ensure that a carrier's charges or practices are not "unreasonably discriminatory."[47] Continued application of the prohibition against unreasonable discrimination, which is contained in Title II, is necessary to ensure that Verizon does not discriminate unreasonably against non-affiliated ISPs. Indeed, Verizon has expressly conceded that, if the Commission eliminates this requirement, it will provide service on a

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[43] *Independent Data Communications Manufacturers Association, Inc. Petition for Declaratory Ruling That AT&T's InterSpan Frame Relay Service Is a Basic Service,* Memorandum Opinion and Order, 10 FCC Rcd 13717, 13719 (1995) (emphasis added).

[44] *Policy and Rules Concerning the Interstate, Interexchange Marketplace,* Report and Order, 16 FCC Rcd 7418, 7445 (2001).

[45] *Id.* at 7445-46.

[46] *See ASCENT v. FCC,* 235 F.3d 662, 666 n.7 (D.C. Cir. 2001) (noting the Commission's conclusion that Section 706 of the Telecommunications Act is not an independent basis of forbearance authority).

[47] *See* 47 U.S.C. § 160(a)(1).

"private carriage" basis.[48] As a private carrier, Verizon could refuse to provide service to an ISP – or could provide service on a discriminatory basis. The Commission cannot use its forbearance authority to allow Verizon to do so.[49]

B. The Commission's Decision Not to *Extend* the *Computer II* Unbundling Requirement to Cable System Operators Provides No Basis to Eliminate Application of Those Rules to Telecommunications Carriers

Verizon insists that the Commission must treat ILECs and cable system operators identically. Because the Commission declined to extend the *Computer II* unbundling requirement to cable system operators, Verizon contends, the Commission must cease applying that rule to the ILECs.[50] This is plainly wrong.

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[48] *Verizon Petition* at 20.

[49] The Commission cannot allow a common carrier to provide telecommunications service on a private carriage basis whenever the Commission determines the market is competitive. *See NARUC v. FCC,* 525 F.2d 630, 644 (D.C. Cir. 1976) (The Commission does not have "unfettered discretion . . . to confer or not confer common carrier status on a given entity, depending on the regulatory goals its seeks to achieve.); c*f. ASCENT v. FCC,* 235 F.3d at 666-67 (Commission cannot "circumvent" the limitations on its forbearance authority based on a determination that the "advanced services" market is competitive). Indeed, the Commission has previously considered – and rejected – a proposal to do just that. In 1990, the Commission proposed to "permit IXCs to provide a limited amount of [telecommunications] service" – exclusively in the competitive large business customer market – "on a private carriage basis." *Competition in the Interstate Interexchange Marketplace,* Notice of Proposed Rulemaking, 5 FCC Rcd 2627, 2644-45 (1990). In the face of significant questions as to the Commission's legal authority, the agency subsequently declined to adopt this proposal. *See Competition in the Interstate Interexchange Marketplace,* Report and Order, 6 FCC Rcd 5880, 5897 n.150. (1991).

[50] *See, e.g., Verizon Petition* at 12 ("Given the Commission's decisions not to regulate the dominant players in each segment of the broadband market, it must also refrain from regulating Verizon and other secondary market participants."); *id.* at 15 ("[G]iven that the Commission has specifically, if tentatively, concluded that forbearance from the Title II requirements would be appropriate in the case of the market-leading cable modem providers . . . it has no choice but to decline to apply those regulations to secondary market participants like Verizon.").

In the *Cable Declaratory Ruling,* the Commission declined to apply the *Computer II* unbundling rule to cable systems on the grounds that cable-system-provided Internet access service is exclusively an information service, and that cable system operators should not be required to "extract" the underlying telecommunications service and offer it on a non-discriminatory basis.[51] The Ninth Circuit, however, subsequently vacated that decision in the *Brand X* case, finding that cable-based Internet access services consist of both an information and a telecommunications service.[52] The Supreme Court has now agreed to review this decision.[53] If the Supreme Court affirms the Ninth Circuit's decision, both ILEC and cable-provided information services will be subject to the same regulatory requirements, thereby eliminating Verizon's objections that the regulatory regime applicable to ILEC-provided broadband services is more onerous than the regulatory regime applicable to cable-provided information services.

Even if the Supreme Court reverses the Ninth Circuit, and upholds the Commission's *Cable Declaratory Ruling,* this does not provide a basis for the Commission to stop applying the *Computer II* unbundling rule to Verizon's information services. While the Telecommunications Act removed legal barriers to intermodal competition, it did not abolish the separate regulatory regimes applicable to ILECs and cable system operators. To the contrary, Congress imposed specific regulatory obligations on the ILECs, which are designed to protect consumers and

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[51] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4825 (2002) ("*Cable Declaratory Ruling*").

[52] *See Brand X Internet Services v. FCC,* 345 F.3d 1120 (9th Cir. 2003).

[53] *See* 125 S. Ct. 655 (U.S. Dec. 3, 2004) (Nos. 04-277 & 04-281). At a minimum, the Commission should defer any consideration of Verizon's forbearance request until after the Supreme Court decides the *Brand X* case, which should significantly clarify the Commission's obligations to regulate broadband services.

promote competition.[54] These obligations are fully applicable to the ILECs' provision of broadband telecommunications services. Congress's decision to impose special obligations on the ILECs reflects their unique role: The ILECs' local networks were constructed in order to transport information provided by others. They remain the only transmission platform that can provide access to virtually any business or residence in the country. The public interest requires that Verizon and the other ILECs keep this platform "open" on a non-discriminatory basis.

By contrast, cable systems were designed to provide one-way transmission of multi-channel video programming. Therefore, cable systems historically have not been required to provide transmission service to others. Rather, Congress has imposed different regulatory obligations. For example, cable operators must often pay substantial franchise fees.[55] In addition, cable system operators must devote capacity to so-called PEG (public interest, educational, and government) programming and to public access programs.[56] These obligations, of course, are not applicable to Verizon and the other ILECs. Because nothing in the Act requires "symmetry" in the regulation applicable to ILECs and the cable systems, even if the Commission does not extend the *Computer II* unbundling obligation to cable-provided information services, it should retain those obligations for Verizon's information services.

Contrary to the Verizon's suggestion, Section 706 of the Telecommunications Act does not require that ILEC and cable-provided broadband must be "*regulated* 'without regard to any transmission media or technology.'"[57] Section 706, which is codified as a footnote to Title I of

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[54] *See, e.g.,* 47 U.S.C. § 251(c).

[55] *See id.* § 542(b) (setting cap on local franchise fees of five percent of gross revenues).

[56] *See id*. §§ 531 & 535.

[57] *Verizon Petition* at 13 (emphasis added) (quoting 47 U.S.C. § 157(note)).

the Communications Act, is merely a general directive to the Commission to "encourage the deployment . . . of advanced telecommunications capability."[58] The Commission is to do so using whatever regulatory tools it believes best suited – whether by regulating dominant providers in a more efficient manner, eliminating regulation that is no longer necessary, or taking affirmative measures that promote competition. [59]

The *only* reference to "platform neutrality" in Section 706 is the definitional portion, which states that "advanced telecommunications capability" is *defined* as high-speed broadband telecommunications "without regard to any transmission media or technology."[60] While this provision demonstrates Congress's awareness that numerous technologies can be used to provide broadband telecommunications, nothing in the language of the statute – or in the legislative history – suggests that Congress intended to override the distinction contained elsewhere in the Communications Act between ILECs and other providers, or to divest the Commission of its authority to apply different regulatory approaches to different providers.

IV. THE COMMISSION SHOULD NOT FORBEAR FROM APPLYING THE JOINT COST RULES TO VERIZON'S BROADBAND SERVICES

Finally, Verizon claims that the Commission must forbear from applying its Part 64 (Joint Cost) accounting rules to Verizon's broadband services. [61] The Commission should decline to do so.

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[58] 47 U.S.C. § 157 (note).

[59] *See id.*

[60] *Id.* at § 157 (note) (c)(1).

[61] *Verizon Petition* at 21 n.51.

The Commission's Joint Cost Rules require the ILECs to appropriately allocate the cost of facilities used to provide both regulated and non regulated services. As the Commission has explained, these rules seek to ensure that "if there are savings to be gained from the integration of regulated and non-regulated ventures, those savings [are] shared equitably with ratepayers in order to achieve regulated service rates that are just and reasonable."[62] If the Commission grants Verizon's request, however, Verizon could force its basic telecommunications customers to absorb 100 percent of the cost of any facility that Verizon uses to provide both basic telecommunications and broadband information services. For example, if Verizon uses its copper loop plant to provide both basic telephony and a DSL-based Internet access service, Verizon could allow its Internet access customers to use the loop for free – thereby imposing all of the cost of the loop plant on its basic telephony customers. This plainly would have an adverse effect on Verizon's telecommunications service customers, while distorting competition in the broadband information services market. The Commission should not permit Verizon to do so.

CONCLUSION

Verizon has failed to demonstrate that continued application of Title II common carrier regulation, the *Computer II* unbundling rules, and the Joint Cost Rules to it broadband services are no longer necessary to prevent unreasonable discrimination and protect consumers. To the contrary, because Verizon is not subject to effective competition in the wholesale broadband telecommunications services markets, and because it retains the incentive to discriminate against

[62] *Separation of Costs of Regulated Telephone Service from Costs of Non-regulated Activities,* Report and Order, 2 FCC Rcd 1298, 1304 (1987).

non-affiliated ISPs, these regulations remain essential. The Commission, therefore, should deny in full Verizon's forbearance petition.

Respectfully submitted,

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